

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.1198 OF 1997
IN
ARBITRATION PETITION NO.165 OF 1996
IN
AWARD NO.36 OF 1996

Manganese Ore (India) Limited .
a Company registered under the .
Companies Act, 1956, having its .
registered office at 3, Mount .
Road Extension, Nagpur, .
State of Maharashtra .
....Appellant
Ori.Petitioner

V/s.

Ram Bahadur Thakur Limited, .
a Company registered under .
the Companies Act,1956 and .
having its registered office .
at Jitwarpur Kothi, .
District Samastipur (Bihar) .
....Respondent
Ori.Respondent

Mr.P.C. Markanda, Senior Advocate with Mr.Naresh
Markanda and Mr.Sanjay Udeshi i/b M/s.Sanjay Udeshi &
Co. for the Appellant.

Mr.Pankaj Vijayan with Mr.Premlal for the Respondent.

**CORAM : DR.S. RADHAKRISHNAN &
S.J. VAZIFDAR, JJ.**
DATED : 2ND MAY, 2006.

ORAL JUDGMENT (PER S.J. VAZIFDAR, J.) :

1. This is an Appeal against the order of the
learned single Judge admitting the Appellant's Petition
under Section 30 of the Arbitration Act, 1940 for

setting aside an interim award of the learned sole Arbitrator only to consider the issue of jurisdiction. The learned single Judge held that the other grounds of challenge pertain only to disputes relating to facts, appreciation of evidence and interpretation of the terms of the contract, all of which have been dealt with by the learned Arbitrator and did not warrant interference. Thus this Appeal is against the order in so far as the learned single Judge refused to admit the Petition as regards the questions other than the one pertaining to jurisdiction.

2. By an order dated 4.2.2002 another learned single Judge of this Court dismissed the Petition at the final hearing thereby negating the Appellant/Petitioner's contention regarding jurisdiction. The Appellant filed an Appeal being Appeal No.529 of 2002 against this order which has not been pressed before us.

3. Mr.Markanda, the learned Senior Counsel appearing on behalf of the Appellant/Petitioner submitted that the impugned interim award passed by the sole Arbitrator contains several errors apparent on the face of award. The disputes relate to an agreement dated 6.5.1988 entered into between the Appellant and

the Respondent. By the said agreement the Appellant agreed to sell to the Respondent about 1,00,000 Metric tonnes, 5% more or less, of Manganese Ore of the quality and on the terms and conditions mentioned therein. We will set out the relevant clauses while dealing with each of the submissions advanced on behalf of the Appellant. Suffice it to note at this stage that two qualities of manganese ore viz. 44/46% (lower grade) and 46/48% (higher grade) were to be supplied at a price of Rs.228/- and Rs.275/- per wet metric tonne respectively.

4. The agreement contained an arbitration clause. The disputes and differences between the parties arising out of or under the contract were to be referred to a sole Arbitrator on the panel of the Indian Council of Arbitration in accordance with the provisions of the Indian Arbitration Act, 1940. The present proceedings are also governed by the 1940 Act and not by the Arbitration and Conciliation Act, 1996. The disputes and differences between the parties were accordingly referred to arbitration.

5. According to the Respondent, the Appellant committed breaches of the said agreement by having supplied poor quality of the said goods as well as by

failing to deliver the entire quantity of the said goods of the higher grade. The Respondent claimed a sum of Rs.2,79,469=59 ps. as and by way of refund/reduction in price due to alleged impurity in 85,000 metric tonnes of the lower grade manganese ore. The Respondent also claimed Rs.2,81,65,800/- for the alleged non-supply of 15,000 metric tonnes of manganese ore of the higher grade.

6. The learned Arbitrator made and published the said interim award dated 21.8.1995. The learned Arbitrator held that the Appellant had committed breach of the said contract by failing to supply 15,000 metric tonnes of the higher grade manganese ore and that the Respondent was entitled to recover from the Appellant damages, if any, by reason thereof. The learned Arbitrator further held that no evidence on the quantum of damages could be led before him unless he first came to the conclusion that there was a breach of contract committed by the Appellant and therefore fixed the date for further hearings for the purpose of enabling the parties to lead evidence on the question of damages. The learned Arbitrator however rejected the first claim pertaining to the quality of the said goods.

7. Mr.Markanda, the learned Senior Counsel

appearing on behalf of the Appellant, submitted that there were nine errors of law apparent on the face of the said interim award.

FIRST GROUND

8. The first ground of challenge was that the Arbitrator ignored the relevant evidence. The submission was based on a letter dated 19.12.1988. The submission is not well founded.

(a). The letter dated 19.12.1988 was specifically referred to in paragraph 20 of the interim award.

(b). Faced with this, Mr.Markanda submitted that though the letter had been specifically referred to in the interim award, the Arbitrator had failed to take it into consideration. This submission is not well founded either. The Arbitrator extracted the very part of the letter relied upon by Mr.Markanda which reads as under :-

"We agree not to ask for 46/48% Mn. grade but at the same time, request you to increase the quantity of 44/46% Mn. grade from 85,000 to 1,25,000 tonnes. This we require in order to satisfy our buyers with the

supply of increased quantity of
44/46% Mn. grade."

(c). Mr.Markanda submitted that the letter established that the Respondent had itself cancelled the contract in relation to 15000 M.T. of the higher grade manganese ore. The learned Arbitrator construed the letter as being merely a conditional offer agreeing not to ask for the supply of 15,000 M.T. of higher grade ore if the Appellant agreed to increase supply of the lower grade ore from 85,000 to 1,25,000 tonnes.

(d). Firstly, we are entirely in agreement with the learned Arbitrator's construction/interpretation of the said letter. This is clear in fact by reading the letter as a whole. In the earlier part of the letter, the Respondent stated that they had delayed taking delivery of higher grade ore as per the Appellant's desire. The Respondent further stated that the time had come for them to synchronize the delivery schedule of both grades as per the contract. The Respondent also stated that in the meeting held in October, the Appellant had again requested the Respondent to further postpone taking delivery of the higher grade ore. It is obvious that it was with a

view to accommodate the Appellant that the Respondent agreed not to ask for the higher grade ore adding however their request to increase the quantity of the lower grade ore.

(e). Secondly, even assuming that we did not agree with the learned Arbitrator's interpretation of the letter, the same is in any event a plausible interpretation. That being so, it would not be open for us to substitute the reasonings furnished by the Arbitrator with our interpretation.

SECOND GROUND

9. The second contention was that the Arbitrator had wrongly determined the date of the breach of contract by the Appellant. The Arbitrator held that the date of breach to be 30.6.1989. Mr.Markanda further submitted that in arriving at the date of breach, the Arbitrator had ignored the evidence on record.

(a). The submission is based on paragraph 1 of a telex dated 23.2.1988 addressed by the Respondent to the Appellant which reads as under :-

"1) KINDLY REFER TO THE LAST DISCUSSION WE HAD WITH YR GOODSELF WHEN OUR MR CB SHARMA HAD BEEN THERE DISCUSSING THE POSSIBILITY OF PURCHASING 100.000 TONS MANGANESE ORE FRM YR GOODSELF FOR DELIVERY STARTING MARCH/APRIL 1988 TO BE COMPLETED BY 1989 APRIL."

According to Mr.Markanda, the entire contract was to be performed latest by April, 1989.

(b). The submission is not well founded. The agreement dated 6.5.1988 was entered into after the said telex dated 23.2.1988. The agreement does not specify the time for completion of the contract. The clause pertaining to delivery in the agreement merely states : "The Buyers undertake to make their best efforts to lift a minimum of four consignments before 31.10.1988."

(c). Faced with this, Mr.Markanda submitted that the telex dated 23.2.1988 was incorporated in the said agreement dated 6.5.1988. Firstly there is nothing on record that suggests the same. Moreover this was not the argument before the learned Arbitrator. The Petition thus does not contain this contention. This was not the argument before the learned single Judge. The submission is therefore rejected. Further as we

shall demonstrate while dealing with the next ground of challenge, the submission is contrary to the stand taken by the Appellant that the contract was to be performed by the end of the financial year ending on 31.3.1989. The contention is therefore rejected.

THIRD GROUND

10. The third contention was there was no basis for arriving at the finding that the contract ought to have been performed by 30.6.1989.

(a). As we have already observed, the agreement dated 6.5.1988 itself does not place any outer limit for the performance of the agreement. It was in fact the Appellant's case that the contract ought to have been performed by 31.3.1989. The learned Arbitrator has dealt with this argument in considerable detail especially in paragraphs 22 to 27 of the interim award.

(b). It is pertinent to note issue No.2 raised before the learned Arbitrator which reads as under :-

"2) If answer to point No.1 above is in the affirmative, whether the contract came to an end on 31.3.1989 as alleged in para 5 of

the Written Statement."

The learned Arbitrator dealt with the delivery clause in the agreement the relevant part whereof reads as under :-

" "Delivery will be made in consignments of about 12,000 to 15,000 tonnes each at time of 46/44% Mn. grade and 2,000 to 3,000 tonnes of 48/46% grade
.....
The Buyers undertake to make their best efforts to lift minimum of 4 consignments before 31.10.1988."

(c). The learned Arbitrator construed the clause to mean that no period of time was specified within which the delivery of 15,000 M.T. of higher grade ore should be completed and that the Respondents were merely to make their best efforts to lift the minimum of 4 consignments before 31.10.1988. It was held that it was difficult to see how on a plain natural construction of the language of the contract, it could ever be contended that the delivery was to be completed by that date. We are in respectful agreement with the construction placed on the clause by the learned Arbitrator.

(d). Further it is important to note, as is evident from issue No.2 extracted above, that it was the Appellant's contention that the contract would

expire on 31.3.1989. This was in fact argued before the learned Arbitrator at considerable length. After construing the entire record and evidence, the learned Arbitrator rejected the contention. This was a pure finding of fact which warrants no interference whatsoever. The Arbitrator specifically dealt with the reasons and analysed the entire record in that regard while coming to the conclusion that there was no agreement or mutual undertaking between the parties that the contract would expire on 31.3.1989.

(e). Thereafter in paragraph 30, the learned Arbitrator held that having completed the delivery of 85,000 M.T. of the lower grade ore by the first week of April, 1989 or in any event by 31.3.1989, the Appellant ought to have delivered 15,000 M.T. manganese ore of 46/48% grade within a reasonable time from 31.3.1989. The learned Arbitrator recorded the period of three months as reasonable time within which the delivery of 15,000 M.T. manganese ore of 46/48% grade should have been completed. This is how the learned Arbitrator came to the conclusion that 30.6.1989 would be the date of breach. It is with reference to this date that the damages, if any, could be claimed by the Respondent from the Appellant. In other words, the date of breach was held to be

30.6.1989.

(f). We are entirely in agreement with the reasoning adopted by the learned Arbitrator. If anything the Arbitrator has been charitable to the Appellant. Even if the date of breach had been fixed on a later date, the finding could not have been challenged. At the cost of repetition, it must be remembered that it was the Appellant's case that the contract was to be performed by 31.3.1989. The contract itself did not contain an absolute outer date. Indeed it is the Respondent who could have made a grievance against this finding and not the Appellant.

FOURTH GROUND

11. The fourth contention was that the learned Arbitrator ought to have fixed different dates of delivery and thereby different dates of the alleged breach by the Appellant. The submission is not well founded.

. The agreement does not specify any fixed delivery schedule. It does not specify any fixed amounts to be delivered either on a particular date.

The delivery clause, reproduced above, merely states that the delivery would be made in consignments of about 2000 to 2003 tonnes of higher grade.

FIFTH GROUND

12. The Respondent's case was that the Appellant had committed a breach of contract on 29.4.1990. The Arbitrator determined 30.6.1989 to be the date of breach. Having come to the conclusion that the date of breach was 30.6.1989, according to Mr.Markanda the learned Arbitrator ought to have dismissed the entire claim. We are unable to agree.

(a). Merely because a party alleges that a breach of contract was committed on a particular date and the Court/Tribunal/Arbitrator comes to the conclusion that the breach was committed on another date, the same would not entail a dismissal of the claim. The only consequence, would be to compute damages with reference to the date of breach determined by the Court.

(b). Mr.Markanda's reliance upon a judgment in the case of *M/s.Matanhella Brothers and others v. M/s.Shri Mahabir Industries Pvt. Ltd., AIR 1970,*

Patna 91 is therefore of no assistance to him. In that case there was no evidence whatsoever of damages. In the present case the parties have yet to lead evidence regarding damages.

SIXTH GROUND

13. Nor do we find any substance in the submission that having rejected the first claim, the Arbitrator ought to have for the same reason rejected the second claim. As stated above, the first claim pertains to a deficiency in quality and the second claim pertains to non-supply.

SEVENTH GROUND

14. Mr.Markanda contended that the delivery clause in the contract provided that the delivery of each consignment would be effected by the sellers on receipt of specific instructions from the buyer. He submitted that the Appellant had never received specific instructions from the buyer.

(a). This is a question of fact. It was raised in the reply to the statement of claim. Evidence was led

by both the parties on this aspect. The learned Arbitrator has analysed the pleadings and the evidence in considerable detail. It is impossible to find any flaw in the award.

(b). The Arbitrator after considering the entire evidence preferred the oral testimony of the Respondent's witness. The Arbitrator for instance referred to letters dated 5.10.1988, 19.12.1988 and 5.9.1989 wherein the Respondents had inter-alia stated that they were anxious to take delivery of the higher grade ore but that the Appellant requested them to postpone taking delivery of the same. The Arbitrator noted that the contents of this correspondence were not controverted by the Appellant. The Arbitrator therefore came to the conclusion that the Respondent had demanded delivery of the ore during the subsistence of the contract.

(c). The learned Judge was therefore, with respect, entirely correct in observing that the dispute was purely one of fact. It is not open in our opinion to interfere with the Arbitrator's analysis of the evidence. In fact on the basis of the arguments advanced before us, it appears quite evident that the Arbitrator could not have taken a different view.

(d). The error in this submission arises on account of it being based on the unwarranted presumption that the specific instructions must only be in writing. The contract does not require the specific instructions demanding delivery of the ore to be only in writing. This was in fact not even pleaded in the reply to the statement of claim.

15. For the same reasons, we are not inclined to accept Mr.Markanda's contention that there were no specific instructions for delivery prior to 31.3.1989. He submitted that even assuming that the Arbitrator's decision about the date of breach being 30.6.1989 was correct, there was no specific instruction prior thereto for delivery. This contention was also based on premise that the specific instructions could only be in writing. The same, as we have seen above, is incorrect. Merely because there was a letter to this effect dated 5.9.1989, it does not follow that there was no specific instruction earlier. As a matter of fact there were.

EIGHTH GROUND

16. Mr.Markanda then submitted that the

Arbitrator has no jurisdiction to award damages. He based his submission upon the following clause in the contract :-

<u>GOODS SOLD & PURCHASED</u>	About 1,00,000 Metric tonnes, 5% more or less of Manganese	
<u>QUALITY</u>	Manganese ore of the following specifications ;	
Mn.	44/46%	46/48%
Fe.	10.00% Max.	9.00% Max.
S102+A1203	15.00% Max.	14.50% Max.
P	0.200% Max.	0.200% Max.
Quantity	Not less than 85,000 tonnes	Not more than 15,000 tonnes
Size :	Minimum 80% Over 6 mm.	Minimum 80% Over 6 mm.

(a). According to Mr.Markanda the clause is capable of only one interpretation. According to him the clause correctly construed implies that the Appellant was entitled to supply the entire 1,00,000 M.T. of the lower grade ore. In other words according to him it was not necessary for the Appellant to supply any quantity of the higher grade ore. He based his submission in view of the words "not less than 85,000 tonnes" and "not more than 15,000 tonnes" appearing against the provision for "quantity" and under the columns relating to 44/46%

grade and 46/48% respectively.

(b). On behalf of the Respondent, it was contended that this is an erroneous interpretation of the clause. According to the Respondent, the correct interpretation is that the Respondent was bound to seek delivery of not less than 85,000 tonnes of the lower grade manganese ore and not more than 15,000 tonnes of higher grade Manganese Ore.

(c). We agree with the Respondent's interpretation of the clause. A meaningful reading of the clause clearly establishes the same. If the interpretation placed by the Appellant was correct, specific words to that effect would certainly have been included. The cap placed by clause supports the Respondent's interpretation.

(d). Let us presume that Mr. Markanda's interpretation is plausible although we are inclined to accept the interpretation placed on the clause by Mr. Vijayan, the learned counsel appearing on behalf of the Respondent. Even then it would not be permissible for us to substitute our interpretation for that of the learned Arbitrators in view of the fact that the Arbitrator's interpretation of the clause is certainly

a plausible one. (See *U.P. Hotels versus State Electricity Board* (1989) 1 SCC 359 ; *Sudershan Trading Co. versus Government of Kerala* (1989) 2 SCC 38.)

NINTH GROUND

17. Mr.Markanda lastly submitted that the learned Arbitrator had no power or jurisdiction to pass an interim award. He submitted that the learned Arbitrator having come to the conclusion that the date of breach is 30.6.1989 should have proceeded to dismiss the claim on the ground that there was no evidence of the market value as on that date. The submission is not well founded.

(a). The Arbitrator has power under Section 27 of the 1940 Act to pass an interim award. Mr.Markanda however submitted that the entire evidence had been led and the Arbitrator had no jurisdiction to permit further evidence to be led.

(b). We are unable to agree with this submission. The Respondent had contended that the date of breach ought to be fixed as on 26.4.1990. The Appellants of-course contended that there was no breach on their part. The learned Arbitrator held 30.6.1989 to be the

date of breach. In these circumstances, the learned Arbitrator held in paragraph 31 as under :-

"31. I, therefore, hold that the Respondents committed a breach of the contract dated 6th May 1988 by not delivering to the claimants 15,000 metric tonnes of manganese ore of 46/48% grade as required under the Contract and since, in my judgement the date of breach was 30th June 1989. I AWARD AND DECLARE that the Claimants are entitled to recover from the Respondents damages, if any, by reason of the breach of the contract committed by the Respondents on 30th June 1989. Since no evidence on the quantum of damages could be led before me, unless I first came to the conclusion that there was a breach of the contract committed by the Respondents, I now fix the Arbitration Meeting at 10.00 a.m. on 28th August 1995 in my room at the Taj Hotel, Bombay for the purpose of enabling the parties to lead evidence on the question of damages. If necessary, the arbitration will continue at 10.00 on 29th August 1995."

(c). The learned Arbitrator obviously took a view that as he had arrived at the date of breach to be different from the one alleged by the Respondent, it was necessary to permit the Respondent to lead evidence regarding the market rate as on that date for the purpose of computation of damages, if any, suffered. Indeed what the learned Arbitrator has done was only fair and just. Neither party was prejudiced

by the same in any manner whatsoever. This can hardly be a ground of misconduct. There is no statutory or other bar against an Arbitrator permitting a party to lead further evidence in such circumstances.

18. In these circumstances, the Appeal fails.

19. Mr.Markanda had submitted that if we were inclined to set aside the interim award, we ought to supersede the reference under Section 19 of the Arbitration Act in view of the fact that eleven years have passed since the interim award was made.

20. We find this criticism against the learned Arbitrator for not having proceeded with the arbitration unfair. It is true that there was no stay granted by this Court of further proceedings and that the learned Arbitrator was at liberty to proceed with the arbitration. It is however obvious that the learned Arbitrator has not proceeded with the reference in view of the challenge to the award pending in this Court. He did so out of deference to this Court. We cannot over-look the fact that often Arbitrators, out of deference to the Court do not proceed with the reference when matters are pending in Court despite the fact that they are not legally bound

to do so. The same is often done by Judges when matters are pending before the higher Court. Even in the High Court very often Judges do not proceed with matters when they are informed that the matter or even connected matters are pending in the Supreme Court. In these circumstances, it would be rather unfair to criticise an Arbitrator for not having proceeded with the arbitration the Court. Thus even if we had decided to set aside the award, we would have rejected the application to supersede the reference.

21. In the circumstances, the Appeal is dismissed. The Appellant shall pay the costs of this Appeal to the Respondents fixed at Rs.10,000/- within twelve weeks from today.

(DR.S. RADHAKRISHNAN, J.)

(S.J. VAZIFDAR, J.)

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DATE OF DECISION : 2ND MAY, 2006

For Approval and Signature :

HON'BLE MR.JUSTICE DR.S.RADHAKRISHNAN

HON'BLE MR.JUSTICE S.J. VAZIFDAR

1. Whether Reporters of Local Papers)
may be allowed to see the judgement ?)
2. To be referred to the Reporter or)
not ?)